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Supreme Court of the United States

OCTOBER TERM, 1957

No. 10

WILLIAM GIGLIO and FRANK LIVORSI,
Petitioners,

—against—

UNITED STATES OF AMERICA

PETITION FOR REHEARING

JOSEPH LEARY DELANEY,
HAROLD W. WOLFRAM,
Attorneys for Petitioners.

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PETITION FOR REHEARING

Petitioners apply for rehearing of this Court's decision rendered on January 13, 1958. This petition is limited to the contention that petitioners were consistently denied an opportunity to examine and cross-examine witnesses at the trial to determine whether the prosecution used evidence derived from leads and clues furnished by materials obtained from the petitioners during the course of the 1952 grand jury proceedings.

This Court held that it "cannot be doubted" that petitioners had the right "to examine and cross-examine witnesses at the trial to determine whether evidence derived from leads and clues furnished by materials obtained from them in the 1952 grand jury proceedings, was used by the prosecution at the trial * * *," and added that "the Government does not otherwise contend." This Court found that the "record discloses that petitioners were accorded that right." As a matter of fact, the record demonstrates that both trial judge and prosecutor repeatedly denied the petitioners the opportunity to examine and cross-examine witnesses to determine whether tainted evidence infected the trial.

I.

The problem confronting counsel for the petitioners at the trial was to ascertain whether tainted evidence had been used either before the grand jury or at the trial itself. We now know, as a result of the decisions of this Court in *Costello v. United States*, 350 U. S. 359 and in the present case, that counsel was not at liberty to attack the procedural validity of the indictment.

However, everyone concerned with this prosecution below, namely, court, defendants' counsel and United States attorney, proceeded on the theory that, under certain circumstances, the defendants would be entitled to a hearing concerning the use of tainted evidence both before the grand jury and at the trial. The parties merely differed as to the prerequisites for such a hearing. Defendants' counsel maintained that they were entitled to make such an inquiry (relating to both the grand jury proceedings and the evidence used at the trial) by virtue of the fact that the government had obtained a vast amount of tainted evidence by violating defendants' privilege against self-incrimination in an earlier grand jury proceeding. Both the court and prosecutor, on the other hand, assumed that the defendants could inquire as to the evidence used before the second grand jury *and* that employed at the trial only if the defendants furnished an additional foundation consisting of some proof of the actual *use* of tainted evidence. Subsequent events have established that the petitioners were wrong in one respect—they were not entitled to inquire as to the procedural validity of the indictment. However, not only were the trial court and prosecutor wrong with respect to this issue (petitioners were not entitled to inquire about the indictment even if they did establish a further foundation), but, what is crucial on this appeal, the trial court and the prosecutor were in grave error when they

repeatedly insisted upon a further foundation before an inquiry would be permitted as to the use of tainted evidence at the trial. For this Court has now held, on the authority of *Nardone* v. *United States*, 308 U. S. 338, 341-2, that petitioners were entitled to examine and cross-examine government witnesses concerning the use of tainted evidence at the trial, without establishing any further foundation.

The insistence of the trial judge that the petitioners establish a further foundation before they would be permitted to inquire into the source of the government's evidence is the key to the prejudicial rulings below, yet it is not referred to in the government's brief and it is not discussed, or even mentioned, in the opinion of this Court.

II.

Concerning petitioners' attempt to cross-examine Roth, this Court found that the district judge's restrictive ruling "was made upon the ground, as petitioners' counsel stated at the time, that the purpose of the interrogation was to 'go into the question of what evidence was used to obtain this indictment,' rather than to show the use by the Government of tainted evidence at the trial."

It is true that the first question asked of Roth, in this particular sequence, related to an affidavit which he had made in support of the motion of the defendants to dismiss the 1953 indictment (R. 1318) and that petitioners' counsel admitted that the purpose of this interrogation was "to go into the question of what evidence was used to obtain this indictment" (R. 1319). However, the subsequent colloquy, as well as the ruling of the court, went far beyond this limited issue. Judge Palmieri had ruled on a pre-trial motion to suppress:

> "Of course, if during the course of the trial defendants have reason to believe that illegally obtained

> material *is being or may be used against them*, they can object at that time and it will be incumbent upon the trial judge to rule on their objections." (*United States v. Giglio*, 16 F. R. D. 268, 271) [Emphasis added]

Counsel reminded the trial judge, in the midst of the colloquy concerning the cross-examination of Roth, that "Judge Palmieri referred this very question to the trial * * * [t]he question of leads and clues, he referred that to the trial" (R. 1321), whereupon the prosecutor observed: "* * * there is no question but that is true, your Honor, but there has been *no other additional foundation*" (id.). [Emphasis added] Defendants' counsel added: "I don't think it is a question of foundation at all" (id.), a statement which is now supported by the opinion of this Court but which the district judge then refused to heed.

Thereafter, the discussion continued in chambers. Counsel for the defendants at first resumed the argument that they should be permitted to go into the question of the evidence which had been presented to the grand jury (R. 1344-7). (This colloquy is quoted in detail at footnote 12 of this Court's opinion.) Very shortly thereafter, the discussion was broadened to cover the additional problem of evidence which might have tainted the trial. In arguing that no cross-examination be permitted before the trial jury, the prosecutor stated (R. 1353):

> "It is a question of—as to *the admissibility of evidence, and if there is any further foundation* that counsel thinks he can present to the court, I of course can have no objection to his doing so. But I think it should be done out of the presence of the jury." [Emphasis added]

The prosecutor, in unmistakable terms, thus focused the problem directly on the use of tainted evidence at the *trial* ("It is a question of * * * the admissibility of evi-

dence * * *") and took the utterly erroneous position, which the trial judge adopted, that defendants were required to establish a "further foundation" before inquiry as to that issue.

The court thereupon observed (R. 1354):

> "As I sit here now, I see no greater basis for my conducting a hearing than there was for Judge Palmieri conducting one, and as I recall the record that has been made before me, I see no basis yet at all for assuming—or I see no possibility of proving the *use* of these books." [Emphasis added]

Here the court was obviously referring to the use of the tainted books at the trial. Counsel for the defendants replied (id.):

> "Isn't it a fact, your Honor, that the only way we can establish whether leads and clues have stemmed from the illegal seizure is through the witnesses as they are presented to us?"

The court answered that it would all "come through the witnesses as they are presented to us or the exhibits themselves. I think if you look at the overall record, I think perhaps—I mean, I will say as the record nears completion, you will have a pretty good picture of where the Government got its evidence from" (id.).

It is obvious that the "overall record," which the court suggested that counsel examine, could relate only to the evidence used by the government *at the trial*, it would have nothing whatever to do with the evidence used before the grand jury.

At this point, the prosecutor interposed the comment that he did not object "at all to counsel inquiring of Mr. Roth about the documents that he saw. I have no objection and never would have an objection" (R. 1354). This offer, to permit the defendants to inquire concerning the docu

ments which the government was using at the trial, was flatly and unequivocally rejected by the court which observed (id.):

> "* * *. I want to keep this trial as simple as I can, in justice to both sides, and I don't want to get off into this question of documents, even though you might have no objection to it."

Finally, the court ruled (R. 1356):

> "* * * I am ready to hold now that in the absence of any further foundation, I am not going to go off into the use of these records before the jury, and I am not going to conduct any side hearing at this time either, because that in itself wouldn't be very feasible."

Counsel for the defendants excepted to this ruling, and stated: "* * * then that subject is over" (id.).

The trial judge had ruled, contrary to this Court's interpretation of *Nardone*, that the defendants would not be permitted to examine "into the use of these records" (i.e., the tainted evidence) either in the presence of the jury or at a "side hearing." The "further foundation" which the court below demanded is utterly unauthorized under the holding in the *Nardone* case and under the ruling of this Court in the present case.

III.

Concerning defendants' attempt to cross-examine Present, this Court held that "counsel's announced purpose in asking the question was not to determine whether tainted evidence had been or was being used at the trial, but was, rather, to determine whether tainted evidence was 'used by the grand jury that found this indictment.'"

This Court, in footnote 13 to the opinion, points out that counsel for the petitioners made it plain that his purpose in examining Present was to determine whether tainted evidence was used by the grand jury that found the indictment. However, here again, the first question, which related to the use of tainted evidence before the grand jury, soon broadened into a second question which involved the use of tainted evidence at the trial, for the prosecutor stated (R. 1944):

> "It presents a preliminary question as to the admissibility of evidence, as to the suppression of these leads and clues. That kind of a question is not for the jury; it is for the Court."

He quickly added (R. 1945) that there was "no further evidence here than there was before Judge Palmieri," thereby returning to the "further foundation" theme which had been used to prevent the defendants' cross-examination of Roth. This theme was then taken up by the trial judge who, in answer to an observation by defendants' counsel that he could not lay a foundation except to start somewhere, observed (R. 1945):

> "No, Judge Palmieri said there wasn't enough foundation to start laying one, or at least to take the time of this court to progress any further with it, and I think that is about the way I feel about it. I am not going into the subject on the basis of what we have had so far."

The court thus firmly refused to go into what the prosecutor had characterized as "a preliminary question as to the admissibility of evidence, as to the suppression of these leads and clues" because of the failure of the defendants to lay a foundation for such an inquiry, a holding which flaunts the *Nardone* rule and the doctrine enunciated here by this Court that the defendants, under the circumstances of this case, were entitled to examine and

cross-examine government witnesses on the issue of leads and clues used by the government at the trial.

As if to underscore the fact that his ruling related not to the use of tainted evidence in order to procure the indictment, but to the use of tainted evidence at the trial, the court observed shortly thereafter (R. 1958) that he had "the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records." After the prosecutor had concurred, the court added (R. 1958):

> "That is what I want to be sure of.
>
> Now, *you wanted to have a hearing at this time outside the presence of the jury.* Before I take that time, I would like to know what foundation there is for it, and I would like for both counsel to let me have it." (Emphasis added.)

Here the court recognized a demand by defendants of their right to examine or cross-examine witnesses at a hearing outside the presence of the jury to determine whether anything had "come before this jury, this trial jury, which could be attributed to improperly secured records." Here the court flatly refused to permit such an inquiry unless the defendants furnished an additional foundation. This was an unequivocal repudiation of the rule in *Nardone* and of the decision of this Court in this case.

IV.

At the close of the government's case, the court inquired of defendants' counsel (R. 2077) whether there was "anything in this trial before this jury that has been improperly obtained?" Counsel replied (R. 2077):

> "The point was really that we were not able to find out whether those things were improperly obtained

> or not. As the record stands, it is not clear, but we were not allowed, not permitted to inquire into the fact."

The court then answered (R. 2078):

> "Now, if an additional foundation developed before me, why, then, I would reconsider it, as, of course, I would. We would then have a new situation."

This ruling by the trial judge was consistent with his previous refusals to permit the defendants to interrogate with respect to tainted evidence used by the government at the trial, unless and until they provided an "adequate foundation" or a "further foundation," in the face of the *Nardone* requirement that they were entitled to a hearing without more.

The court repeated at the end of a further colloquy (R. 2085):

> "I find nothing in the record of this trial which suggests any use of illegal clues. I find, and as I hear your summary of argument today, I don't think you have a thing more than you had before Judge Palmieri."

The court finally added (R. 2085-6) that "at this moment, I mean, my determination on this question of whether there should be a hearing or something, which you may reopen from time to time as you have anything additional to add, but as of this moment I see no basis for such a hearing."

This is an unambiguous reiteration of the court's steadfast position that until the petitioners showed that tainted evidence actually had been used against them at the trial, they would not be permitted, at the trial or at a separate hearing, to ascertain whether the government had used tainted evidence to convict them.

V.

As to Leone, who was called as a witness by the defendants, this Court observed (footnote 14) that, "all petitioners sought to show by this witness was that when he caused petitioners to be subpoenaed to appear before the 1952 grand jury he knew that criminal informations charging tax evasions were then pending against them, and that these prosecutions were instituted in 'bad faith.'" However, in addition to the foregoing, the trial court ruled out, in the absence of a "better foundation," all questions directed to this witness concerning leads and clues employed by the government at the trial in the following colloquy (R. 2136):

> "Defendants' Counsel: And your Honor's ruling covers the question of being able to ask this witness anything about leads and clues *or* what was presented to the grand jury?
>
> The Court: That's right. If you have any better foundation for that, you come back." [Emphasis added]

Here defendants' counsel succinctly and aptly summarized the position which the district judge had maintained consistently throughout the trial, namely, that the defendants would not be permitted to inquire into the grand jury proceedings or into the question of leads and clues used at the trial, while the court reiterated the "better foundation" requirement which had been laid down as a prerequisite for inquiry from the very outset.

VI.

This Court, in its opinion, observed that the trial judge requested counsel for petitioners "on two occasions, to submit a memorandum of any evidence offered by the Govern-

ment which he believed was obtained through leads or clues from materials produced by petitioners before the 1952 grand jury." This Court added: "No such memorandum was ever furnished." What has been overlooked apparently is that the purpose of this memorandum was to afford the trial judge the "further foundation" which he was insisting upon, and which he had no right to ask for, as a prerequisite to his permitting the defendants to interrogate concerning the use of tainted evidence at the trial. The very fact that this demand was made upon the defendants when, under the holding of this Court in *Nardone* and in the present case they were entitled, as a matter of law, to examine and cross-examine government witnesses without a further foundation, emphasizes the error committed below. If the trial judge had indeed accorded the defendants the right to examine and cross-examine with respect to the use of tainted evidence at the trial, as this Court has held, he would not have demanded, time after time, the establishment of a further foundation (consisting of proof that some tainted evidence had actually been used at the trial) nor would he have requested defendants to submit a memorandum for that purpose. The imposition of such a requirement upon the defendants, as a prerequisite to examination, constituted a serious infringement of their rights.

This Court observed in its opinion:

> "At no time did counsel for petitioners point specifically to any evidence offered at the trial which they claimed was derived from materials furnished by petitioners before the 1952 grand jury."

This is an echo of the trial court's unjustifiable insistence that the petitioners furnish a further foundation before they would be permitted to examine witnesses with respect to the government's use of tainted evidence and is thoroughly inconsistent with the position taken by this Court in the present case that the petitioners had the unquestioned

right to examine and cross-examine witnesses at the trial for that purpose.

VII.

This Court appears to have concluded that petitioners did not seek to examine Roth, Present and Leone concerning the use of tainted evidence at the trial, although they had the undoubted right to do so. We have outlined above the several occasions on which the defendants sought and were denied the opportunity to examine or cross-examine witnesses with respect to tainted evidence used at the trial. Actually, a single ruling by the court adverse to the defendants on this issue preserved the point. *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515:

> "The notion is wholly untenable that in order to protect himself against an imputed surrender, a party must reassert what has been overruled every time the occasion comes up again." (id., at p. 519)

Here the adverse ruling was repeated time after time. If there were nothing more in the record than the observation by the trial judge that the case presented "the additional question of making sure there is nothing that has come before this jury, this trial jury, which could be attributed to improperly secured records," followed by the ruling: "Now, you wanted to have a hearing at this time outside the presence of the jury. Before I take that time, I would like to know what foundation there is for it * * *" (R. 1958), the defendants have fully established the denial of a substantial right.

On this record, it is impossible to determine the extent to which tainted evidence was used at the trial. We know that two tainted documents (Exs. 61-A and 61-B) were offered by the prosecution and received in evidence. The fact that these two documents were used, perhaps "inadvert-

ently" as the Court suggests, emphasizes, rather than rules out, the possibility that other tainted evidence may have infected the trial. Only by according to the defendants the rights which this Court first suggested in *Nardone* and reaffirmed here will all doubts be resolved.

WHEREFORE, petitioners pray for rehearing of this Court's decision of January 13, 1958.

Respectfully submitted,

JOSEPH LEARY DELANEY,
HAROLD W. WOLFRAM,
Attorneys for Petitioners.

JOSEPH LEARY DELANEY, one of counsel for petitioners, hereby certifies that the above application is made in good faith and not for the purpose of delay.

Dated: New York, N. Y., January 31, 1958.

JOSEPH LEARY DELANEY